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No. 92-1818

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FRANCES and DAVID NICHOLS,
Petitioners,

versus

GRAYDEN TUBB, M.D., TOM MCDONALD, M.D.
and
NORTH MISSISSIPPI MEDICAL CENTER,
Respondents.

Respondent North Mississippi Medical Center's Brief In Opposition To Petition For Writ of Certiorari to the Mississippi Supreme Court

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the first or fourteenth amendments to the United States Constitution requires that a trial court permit an attorney in any case unrestricted discretion to interview members of a jury panel post-verdict without judicial oversight or supervision.

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FRANCES and DAVID NICHOLS,

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versus

GRAYDEN TUBB, M.D., TOM MCDONALD, M.D.
and
NORTH MISSISSIPPI MEDICAL CENTER,

Respondents.

Respondent North Mississippi Medical Center[1] respectfully requests that this Court deny the Petition for Writ of Certiorari to review the Mississippi Supreme Court's Denial of Petition for Rehearing of Petition for Extraordinary Writ.

OPINIONS AND ORDERS BELOW

The June 7, 1988, order of the Circuit Court of Lee County, Mississippi, denying petitioners' *ex parte* motion to the court for leave to interview jurors is unreported and is substantially reproduced in the Petition for Writ of Certiorari at 9-10. The August 1, 1990, decision of the Mississippi Supreme Court denying petitioners' Statement of Facts treated as a

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[1] North Mississippi Medical Center, Inc., is a Delaware not-for-profit corporation wholly owned by North Mississippi Health Services, Inc., a Delaware corporation. North Mississippi Medical Center, Inc., has no subsidiary companies.

Petition for Extraordinary Relief pursuant to Miss. Sup. Ct. Rule 21 is unreported and is reproduced in App. A, 1a-2a. The August 19, 1992, opinion of the Mississippi Supreme Court affirming the judgment of the Lee County Circuit Court on the direct appeal is reported at 609 So.2d 377 and is reproduced in the Supplemental Appendix. The December 31, 1992, order denying petitioners' petition for rehearing, granting petitioners' motions for leave to supplement petition for rehearing upon newly discovered information and for leave to further supplement petition for rehearing upon newly discovered information and denying respondents' motion to strike petition for rehearing and supplementations thereto is unreported and is substantially reproduced in the Petition for Writ of Certiorari at 10.

JURISDICTION

The United States Supreme Court has no jurisdiction under 28 U.S.C. § 1257 to review the subject decisions of the Mississippi Supreme Court. The Mississippi Supreme Court's decision respecting any issue of alleged improper extraneous influence upon the jury was final on August 1, 1990, and, therefore, the Petition for Writ of Certiorari is untimely under 28 U.S.C. § 2101(c). Additionally, the federal questions, raised for the first time on petition for rehearing, were not "specially set up or claimed" as required by 28 U.S.C. § 1257 and were presented in violation of Mississippi Supreme Court rules. The Mississippi Supreme Court, therefore, had adequate and independent state grounds for denying the petition for rehearing.

STATEMENT OF THE CASE

The petitioners' medical malpractice action against respondents Dr. Grayden Tubb, Dr. Thomas McDonald and North Mississippi Medical Center ("the Medical Center") was tried in the Circuit Court of Lee County, Mississippi. During an afternoon break on the seventh day of trial, January 27, 1988, a casual exchange took place between two nurses employed by respondent Medical Center and a male juror at the water fountain outside the courtroom in the presence of several other bystanders.[2] The incident was reported to the trial judge, and the juror was excused in order to avoid any appearance of impropriety. [R. 501-06; T. 1383-85].[3]

The trial continued with an alternate juror replacing the excused juror. [T. 1384]. Prior to the reading

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[2] The male juror, Hankins, initiated conversation with one of the nurses, Hunter, by remarking on the temperature and the fact that he was thirsty. Hunter recognized him as the father of a boy who had played "T-ball" with her son many years ago. The second nurse, Harris, approached, and Hankins recalled coaching Harris's son in "T-ball" years previously. A light exchange followed until Sanders, an investigator employed by William S. Lawson, counsel for petitioners, approached the nurses and advised them that they should not speak to a juror even at the water fountain. The conversation, which involved no facts remotely related to the case, ceased almost immediately. [R. 501-06].

[3] In excusing the juror, the trial judge stated "I am of the opinion, having asked counsel for that Defendant to confer with them, that the conversation was completely innocent. I don't want to imply that there was any improper words said. . . . There, I don't think as I stated was any misconduct, but quite surely there is the appearance that the court is concerned with." [T. 1382-85]. Petitioners did not move for mistrial.

of the verdict, the trial judge read and entered an order prohibiting the parties, their counsel, and other persons from

> communicat[ing] with the jury or any member thereof regarding the verdict. Provided, however, that if any attorney believes in good faith that the verdict may be subject to legal challenge such attorney may apply *ex parte* to the Court for permission to interview one or more members of the jury regarding any fact or circumstance claimed to support such legal challenge. If satisfied that good cause exists, the Court may grant permission for the attorney to make the requested communication and shall prescribe the terms and conditions under which the same may be conducted.

[T. 2011-12; R. 596].[4]

The jury returned verdicts in favor of each of the respondents. [T. 2012-13]. Two days later, one of the petitioners' expert witnesses, Dr. William Gary, contacted alternate juror Denham and questioned her concerning the verdict. During their conversation, Denham allegedly asked Dr. Gary whether he knew petitioner Frances Nichols was receiving $7,000 from workers' compensation each month; Denham did not indicate how or when she gained any such informa-

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[4] The court advised the jury that "this in no wise is intended to infringe upon your right of free speech. Feel free if you desire to communicate with anybody you want to communicate with. But I want you to initiate that communication and if you don't want to talk you don't have to. But if you want to, you are welcome to." [T. 2012].

tion.[5] Dr. Gary reported his conversation to Lawson. Lawson then telephoned alternate juror Denham and juror Stasko, falsely representing to them that he had the trial judge's permission to discuss the case with them. [Exhibit 1 to "Statement of the Facts" treated as Petition for Extraordinary Writ in the Mississippi Supreme Court (hereinafter referred to as "Petition for Extraordinary Writ"); R. 628, 631]. Alternate juror Denham refused to talk to Lawson without speaking with the trial judge first, and juror Stasko denied having any information concerning insurance benefits during the deliberations. Stasko stated that he did not learn of insurance benefits until after the jury verdict had been rendered. [R. 628-30, 632 and Exhibit 2 to Petition for Extraordinary Writ].[6]

Thereafter, petitioners filed an *ex parte* motion to interview jurors "before the court, individually, on such terms as the court prescribes." [R. 614-16]. On May 18, 1988, the trial court conducted a hearing on the motion. [T. 2018-51]. In addition to argument,[7]

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[5] Petitioners allege that $7,000 per month was the amount not of workers' compensation benefits but of a joint pretrial settlement offer made by various physicians, including the respondent physicians, which petitioners refused. [Petition for Extraordinary Writ at 1].

[6] Lawson was subsequently convicted of constructive criminal contempt for violating of the trial court's order. That conviction was affirmed by the Mississippi Supreme Court. *See Lawson v. State*, 573 So.2d 684 (Miss. 1990) [App. B, 3a-10a]. No review was sought from this Court.

[7] Petitioners argued that if they were prohibited from communicating further with the jurors, there would be a "deprivation of a United States Constitution article six right, to wit: 'The right of every American citizen to have his case, criminal

the court considered transcripts of Lawson's improper (and surreptitiously recorded) telephone contacts with jurors Stasko and Denham, the affidavits of Sanders, Dr. Gary, and nurses Harris and Hunter. [R. 501-06; T. 2046-47]. On June 7, 1988, the trial court, citing Rule 606(b) of the Mississippi Rules of Evidence,[8] ruled that the evidence failed to establish "good cause to interview jurors with a reasonable expectancy of proving that extraneous prejudicial information was improperly brought to the jury's intention during the course of its deliberations". The court found that the transcripts "affirmatively reflect that neither [jurors Stasko and Denham] nor any of the other jurors who were involved in deliberations, received extraneous prejudicial information improperly brought to the jury's attention . . . during the course of the deliberations." The court denied petitioners' motion for leave to interview jurors. [R. 626-27, Petition for Writ of Certiorari at 9-10].

Petitioners filed their notice of appeal to the Mississippi Supreme Court on August 22, 1988, but did not raise in either the statement of issues or any brief on the direct appeal an issue of extraneous prejudicial information's being improperly brought to the jury's attention. [R. 944].

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or civil, tried by an impartial jury.' " [T. 2030-31]. Petitioners later amended their argument to be premised upon the "sixth amendment, United States Constitution . . . to maintain the integrity of our jury system to keep jurors segregated." [T. 2039].

[8] Rule 606(b) of the Mississippi Rules of Evidence is practically identical to Rule 606(b) of the Federal Rules of Evidence, prohibiting inquiry into the mental processes of jurors but permitting juror testimony "on the question whether extraneous prejudicial information was improperly brought to the jury's attention." *Compare* Miss.R.Ev. 606(b) *with* Fed.R.Ev. 606(b).

After all of the briefs on direct appeal had been filed in the Mississippi Supreme Court, petitioners filed a document entitled "Statement of the Facts" which the court treated as a Petition for Extraordinary Writ pursuant to Rule 21 of the Mississippi Supreme Court Rules. Far from challenging the constitutionality of the trial court's order prohibiting juror contact, the Petition for Extraordinary Writ requested that the Mississippi Supreme Court consider two new affidavits petitioners had obtained[9] and grant petitioners a new trial or in the alternative, permission pursuant to the trial court's order to interview one or more members of the jury. [Petition for Extraordinary Writ at 5-8]. The affidavits did not support petitioners' claim that the jury was subjected to extraneous prejudicial influence. At most, the affidavits indicated that some jurors might have speculated among themselves that the petitioners were receiving medical benefits which were "obviously" being provided by some unidentified source of insurance. Neither affidavit indicated the alleged source of the supposed information regarding insurance coverage. [Exhibits 8 and 9 to Petition for Extraordinary Writ].[10]

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[9] The two new affidavits, apparently obtained in continued willful violation of the trial court's order, were from juror Bates (the one juror who had voted to hold respondent Medical Center liable) and juror Hill (who had been excused for sleeping during the court proceedings). [*Compare* Exhibits 8 and 9 to Petition for Extraordinary Writ *with* T. 2015-16; 1678-80].

[10] If indeed the jury did engage in speculation about whether petitioners were receiving some insurance benefits, there is absolutely no suggestion from any affiant that such speculation originated from extraneous information provided to the jury. The jury did not have to go beyond the evidence presented by the

On August 1, 1990, the Mississippi Supreme Court denied the Petition for Extraordinary Writ without comment. [App. A, 1a-2a].

The Mississippi Supreme Court's opinion on the direct appeal, rendered August 19, 1992, did not address any issue of alleged improper extraneous influence upon the jury. [*See* Supplemental Appendix].[11] On September 8, 1992, petitioners filed a petition for rehearing requesting, *inter alia*, that the Mississippi Supreme Court "reconsider its ruling denying [petitioners'] Petition for Extraordinary Relief". Although the petition for rehearing claimed various violations "of the concept of a fair trial guaranteed by both the State and Federal constitutions," it did not challenge the authority of the trial court to issue an order restricting juror contact in the first instance. [Petition for Rehearing at 13, 19-23].

On October 5, 1992, petitioners filed a motion for leave to further supplement petition for rehearing upon newly discovered information and attempted to assert a constitutional argument based on the "Sixth Amendment guarantee of trial by jury requir[ing] a jury verdict to be based upon evidence produced at trial." [Motion for Leave to Further Supplement

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petitioners themselves to observe that plaintiff had been receiving insurance benefits. [*See* T. 348; Exhibits P-2, P-4.] Additionally, the figure of $7,000 per month was presented to the jury by petitioners as the amount of petitioner Frances Nichols' continuing monthly medical expense. [T. 1087].

[11] The court stated there to be "only two issues raised on this appeal, the first being that reversible error was committed in allowing testimony that was not revealed in pretrial discovery . . . and the second being the erroneous refusal of instructions requested by the plaintiffs." [Supplemental Appendix at 9].

Petition for Rehearing at 8]. On October 9, 1992, petitioners filed a statement of further authorities in support of "proposition III" of their petition for rehearing, raising for the first time first and fourteenth amendment challenges to the trial court's order. [Appellants' Statement of Further Authorities in Support of "Proposition III" of their Petition for Rehearing" at 2-3].

Respondent Medical Center challenged the petition for rehearing and supplementations thereto as being unauthorized, untimely, excessive in length, interjecting issues not raised on direct appeal and for failure to specify any "point of law or fact that the [Mississippi Supreme] Court has allegedly overlooked or misapprehended" as required by Rule 40 of the Mississippi Rules of Supreme Court. [Motion to Strike Petition for Rehearing and Supplementations Thereto].

On December 31, 1992, the Mississippi Supreme Court, without comment, granted the petitioners' motions for leave to supplement their petition for rehearing, and to further supplement their petition for rehearing, but denied the petition itself. [Petition for Writ of Certiorari at 10].

REASONS FOR DENYING THE WRIT

A. *The Petition for Writ of Certiorari is Untimely*

Any petition for writ of certiorari must be filed within ninety (90) days after entry of the final judgment or decree. 28 U.S.C. §§ 1257(a), 2101(c). This time limit is mandatory and jurisdictional. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). In the instant case, no issue concerning alleged improper extraneous influence upon the jury was raised on the direct appeal,

but only by Petition for Extraordinary Writ. That petition was denied by the Mississippi Supreme Court on August 1, 1990;[12] the decision of the Mississippi Supreme Court regarding extraneous influence upon the jury was then final, and the issues pending on direct appeal (jury instructions and alleged discovery violations) could not remotely give rise to a federal question that would require review by this Court. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-80 (1975) (decision on federal issue final for purposes of section 1257 where federal issue will survive regardless of outcome of further state proceedings which could not remotely give rise to additional federal question); *see also Mississippi Power & Light Co. v. Moore*, 487 U.S. 354, 370 n.11 (1988) (critical federal question already answered by state supreme court and ripe for review although further proceedings to be held on remand); *Madruga v. Superior Court*, 346 U.S. 556,

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[12] Petitioners did not file a timely petition for rehearing following denial of the extraordinary writ. Rule 40 of the Mississippi Supreme Court Rules requires that a petition for rehearing "be filed within fourteen (14) days after a decision is handed down on the merits of a case or on a motion". Miss.S.Ct.R. 40(a). Although Lawson acknowledged that the petition for rehearing should have been "promptly filed" following the August 1, 1990 dismissal, he alleged that he never received a copy. [Motion for Leave to Further Supplement Petition for Rehearing Upon Newly Discovered Information at 7]. The Mississippi Supreme Court's order and notice denying the petition disclosed, however, that both of the petitioners' counsel before the Mississippi Supreme Court (Lawson and Wayne Drinkwater) were recipients of the order with the addresses shown as provided to the court by counsel on the briefs for the direct appeal. Drinkwater, lead counsel for petitioners before the Mississippi Supreme Court, made no representation to the Mississippi Supreme Court that he did not receive the August 1, 1990 order.

557 n.1 (1954) (state supreme court judgment finally disposing of writ of prohibition is final judgment reviewable under section 1257). The Petition for Writ of Certiorari, filed over two years later, is untimely, and this Court is without jurisdiction.

B. *Federal Claims, Raised on Petition for Rehearing, Were Not "Specially Set Up or Claimed" and Provided Mississippi Supreme Court Adequate and Independent State Grounds for Denying Petition for Rehearing*

"It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981). The federal right must have been "specially set up or claimed" in the court below. 28 U.S.C. § 1257. In *Godchaux Co. v. Estopinal*, 251 U.S. 179 (1919), this Court, citing the predecessor to § 1257, explained:

> [I]n order to give us jurisdiction to review the judgment of a state court upon writ of error, the essential Federal question must have been especially set up there at the proper time and in the proper manner; and, further, that if first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point.

251 U.S. at 181; *see also Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945) (questions presented on petition for rehearing "come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior

to the original disposition"); *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958) (question raised on petition for rehearing "not seasonably presented"); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (question raised on petition for rehearing "comes too late, unless the court actually entertains the question and decides it"). In *Forbes v. State Council of Virginia*, 216 U.S. 396 (1910), this Court, after reiterating the general rule, held that a state court's recitation of "mature consideration" of the petition for rehearing was insufficient to show that the federal question was "considered and passed upon". 216 U.S. at 399. In the instant case, no federal question was properly raised in the Mississippi Supreme Court. Petitioners' alleged first and fourteenth amendment rights to interview jurors without leave of court were not "specially set up or claimed" below, and this Court is without jurisdiction.

Additionally, "[f]ailure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule." *Michigan v. Tyler*, 436 U.S. 499, 513 n.7 (1978); *Henry v. Mississippi*, 379 U.S. 443, 447-48 (1965). In Mississippi, arguments not set forth as an issue in the original briefs of the parties are waived. *MST, Inc. v. Mississippi Chemical Corp.*, 610 So.2d 299, 305 (Miss. 1992). A party may not, therefore, raise a new issue on petition for rehearing. The Mississippi Supreme Court recently explained:

> The purpose of a petition for rehearing is not to allow counsel to add assignments of error which, for whatever reason, were not

> included in the appellant's original brief to this court. Judicial economy dictates that we consider only those assignments of error set forth in the original brief. The purpose of the petition for rehearing is to allow the parties to point out "the points of law or fact which in the opinion of the petitioner this Court has overlooked or misapprehended . . . ." Miss. Sup. Ct. Rules 40. We cannot misapprehend or overlook that which is not presented for our review.

MST, 610 So.2d at 304.[13]

In the instant case, petitioners' Petition for Extraordinary Writ before the Mississippi Supreme Court did not challenge the trial court's order prohibiting juror contact, but merely requested that the Mississippi Supreme Court accept additional evidence and overrule the trial court's discretionary ruling. No constitutional question was raised in the Petition for Extraordinary Writ. The petition for rehearing following the decision on direct appeal, some two years after

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[13] The *MST* decision answers any question raised in *Hathorn v. Lovorn*, 457 U.S. 255, 263 & n.13 (1982), concerning Mississippi's continued prohibition against presentation of new issues in petitions for rehearing. Following *Hathorn*, the Mississippi Supreme Court adopted new rules of supreme court procedure to replace the prior rules which "had evolved haphazardly". In an "effort to foster uniformity between state and federal practice," the new rules follow the Federal Rules of Appellate Procedure in most respects. *See* Munford, Luther T., *Mississippi Supreme Court Practice*, § 1.5 (1991). Rule 40 of the Mississippi Rules of the Supreme Court respecting content of petitions for rehearing, explained in *MST*, is patterned after Rule 40 of the Federal Rules of Appellate Procedure. *See* Miss. S. Ct. R.40, at comment.

the denial of the Petition for Extraordinary Writ, raised only a general question regarding the constitutionality of the trial court proceedings.[14] It was only upon a third supplementation to the petition for rehearing that the petitioners, acknowledging the deficiency of the petition for rehearing, sought to invoke the protections of the first and fourteenth amendments to the United States Constitution and to challenge the trial court's authority to restrict post-verdict juror contact.

This Court "has frequently stated that when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " *Webb*, 451 U.S. at 495-96 (quoting *Street v. New York*, 394 U.S. 576, 582 (1969)). In the instant case, the specific constitutional provisions petitioners would invoke before this Court were not presented in the state court until supplementation to petition for rehearing, which occurred more than two years after the decision denying the Petition for Extraordinary Writ. The Mississippi Supreme Court is presumed to have denied the petition for rehearing due to the petitioners' failure to comply with state procedural rules governing timing and content of petition for rehearing. The denial of the petition for rehearing, therefore, rests upon adequate and independent state grounds and is not subject to review by this Court.

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[14] *See Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988) (party may not preserve constitutional challenge by generally invoking the constitution in state court).

C. *The Petition for Writ of Certiorari is Without Merit*

This Court has long recognized the necessity of shielding jurors from post-verdict harassment:

> [A]ll verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict.

McDonald v. Pless, 238 U.S. 264, 267 (1915); *see also Stein v. New York*, 346 U.S. 156, 178 (1953) *overruled on other grounds, Jackson v. Denno*, 378 U.S. 368, 391 (1964) (courts have not "favored any public or private post-trial inquisition of jurors as to how they reasoned, lest it operate to intimidate, beset and harass them"). In *Tanner v. United States*, 483 U.S. 107 (1987), this Court stated, "There is little doubt that post-verdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it." *Tanner*, 483 U.S. at 120.[15]

Lower federal courts have expanded upon the "evil consequences" which would result from post-verdict inquiries: "subjecting juries to harassment, inhibiting

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[15] In *Tanner*, counsel had secured a juror affidavit in clear violation of the district court's order and local rule against juror interviews. This Court condemned the practice, stating that "on this basis alone the District Court would have been acting within its discretion in disregarding the affidavit." 483 U.S. at 126.

juryroom deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts." *See United States v. Ianniello*, 866 F.2d 540, 543 (2nd Cir. 1989); *see also King v. United States*, 576 F.2d 432, 438 (2nd Cir.), *cert. denied*, 439 U.S. 850 (1978); *Gagliano v. Ford Motor Co.*, 551 F.Supp. 1077, 1079 (D.Kan. 1982). Requiring a party

> to make a showing of likely misconduct before allowing such an inquiry: protect[s] the jury from post-verdict misconduct and the courts from time-consuming and futile proceedings; reduc[es] the "chances and temptations" for tampering with the jury; and increas[es] the certainty of civil verdicts. We continue to decline to "denigrate jury trials by afterwards ransacking the jurors in search of some ground . . . for a new trial" unless a preliminary showing is made.

Wilkerson v. Amco Corp., 703 F.2d 184, 185-86 (5th Cir. 1983) (quoting *O'Rear v. Fruehauf Corp.*, 554 F.2d 1304, 1310 & n.4 (5th Cir. 1977)) (citations omitted); *Big John, B.V. v. Indian Head Grain Co.*, 718 F.2d 143, 150 (5th Cir. 1983). The United States Court of Appeals for the Second Circuit has recognized:

> A serious danger exists that, in the absence of supervision by the court, some jurors, especially those who were unenthusiastic about the verdict or have grievances against fellow jurors, would be led into imagining sinister happenings which simply did not occur or into saying things which, although inadmissible, would be included in motion papers and would

> serve only to decrease public confidence in verdicts.

United States v. Moten, 582 F.2d 654, 665 (2nd Cir. 1978). Lower courts have not only the power but also "the duty to supervise and closely control [post-verdict jury] inquiries." *United States v. Calbas*, 821 F.2d 887, 896 (2nd Cir. 1987), *cert. denied*, 485 U.S. 937 (1988); *Moten*, 582 F.2d at 665; *Miller v. United States*, 403 F.2d 77, 84 (2nd Cir. 1968), *modified on other grounds*, 411 F.2d 825 (1969).[16]

The instant case is a classic example of the necessity of judicial supervision and oversight of post-verdict jury inquiries. The two surreptitiously recorded telephone conversations between petitioners' counsel and jurors Stasko and Denham revealed that counsel lied to the jurors, attempted to play on their sympathy for petitioners, and attempted to twist the meaning of their statements when those statements did not confirm counsel's suppositions. [R. 631-37 and Exhibit 2 to Petition for Extraordinary Writ; App. B, 3a-10a]. Additionally, the only two affidavits counsel obtained were from two disgruntled jurors,

---

[16] Contrary to the assertions of petitioners that any state interest can be met by "simply . . . providing that counsel's questioning of the jury would be limited to matters of whether there was any extraneous matter brought to their attention", the United States Court of Appeals for the Second Circuit in *Miller*, recognized that "the line between proper and improper inquiry is not easy to draw" and suggested that the trial court "may well find it better that he control any questioning". 403 F.2d at 82. In the instant case, counsel's questioning of juror Stasko actually attempted to elicit the content of juror deliberations, and the affidavits of jurors Hill and Bates likewise purportedly reveal the content of juror discussion and deliberation.

one of whom had been dismissed for sleeping and the other who had been the only juror who voted in favor of the petitioners.

The amount of precious judicial resources which has been wasted on the unfounded juror issues is obvious. At the trial court hearing, counsel for petitioners revealed that he had tape recordings of his conversations with jurors Denham and Stasko. On reviewing these recordings, the trial court found no evidence sufficient to raise a *prima facie* case of improper extraneous influence before the jury. Juror Stasko stated that he had no knowledge of the alleged workers' compensation benefits until after the verdict had been rendered. The additional affidavits included with the Petition for Extraordinary Writ did nothing more than suggest that insurance had been discussed by the jurors, and none of the statements went beyond the evidence presented to the jury in the courtroom or what the jurors could observe every day at trial.

Local rules of court requiring a party and his counsel to show "just cause" as a precondition to post-verdict jury interviews do not violate the first or fourteenth amendments to the United States Constitution. In *Gagliano*, the United States District Court for the District of Kansas found the plaintiff's first amendment challenge to be "wholly conclusory and . . . not refer[ring] to authority for support." The court explained that a party's freedom to speak with jurors following trial "is already seriously limited by Federal Rule of Evidence 606(b). [The] local rule only places a 'just cause' precondition to conduct allowed

by this federal rule." The court explained that the local rule

> is nothing more than a general regulation of plaintiff's counsel's speech in a very narrow and limited context. It incidently limits counsel's speech, but is supported by a valid governmental interest, namely the interest in the orderly conduct of civil trials and the finality of verdicts, and is clearly outweighed by that interest. The rule does not violate the United States Constitution. *Konigsberg v. State Bar of California*, 366 U.S. 36 . . . (1961). It is no different in principle than a licensing requirement prior to speech [*Cox v. New Hampshire*, 312 U.S. 569 . . . (1941)]. . . .

551 F.Supp. at 1079 (brackets in original); *see also Tasin v. Sifco Industries, Inc.*, 50 Ohio St.3d 102, 553 N.E.2d 257, 263 (1990) (local rule prohibiting post-trial communication with jurors without leave of court "not an unconstitutional prior restraint on freedom of speech").

Likewise, two United States Courts of Appeal have upheld, against first amendment challenges, local rules prohibiting juror contact except by leave of court. In *United States v. Griek*, 920 F.2d 840 (11th Cir. 1991), the United States Court of Appeals for the Eleventh Circuit construed the local rule requirement of "good cause" in light of Federal Rule of Evidence 606(b) and held that "good cause under the local rule may be shown only by satisfying the requirements of the exception stated in the Federal Rule." Citing *Tanner, supra,* and *McDonald, supra,* the court of appeals held that any first amendment right was outweighed by the "compelling government interest" that a jury's deliberations not "be exposed to public view except by a showing of outside influence, the basis for the

exception in Rule 606(b)." 920 F.2d at 842-43; *see also United States v. Hooshmand*, 931 F.2d 725, 736-37 (11th Cir. 1991) (upholding against first amendment challenge local rule prohibiting juror contact except upon showing of good cause). In *Big John*, the United States Court of Appeals for the Fifth Circuit found the first amendment challenge to the local rule prohibiting juror contact except upon the explicit leave of court to "ha[ve] no merit." 718 F.2d at 149.

In *Neron v. Tierney*, 841 F.2d 1197 (1st Cir.), *cert. denied*, 488 U.S. 832 (1988), the United States Court of Appeals for the First Circuit held that a procedural scheme requiring a party to make a satisfactory threshold showing of substantiality before invading the jury's privacy "cannot be said to be so harsh as to offend the Constitution" and upheld the state procedure against due process challenge. 841 F.2d at 1200-01. Likewise, in *Gagliano, supra*, the United States District Court for the District of Kansas upheld the local rule requiring "just cause" as a precondition to juror interviews as against a due process challenge. The court found that "the present procedure of requiring a motion, with supporting argument, by the party seeking to interview the jurors, and requiring argument in opposition provide all the process that is due". 551 F.Supp. at 1080; *see also Maldonado v. Missouri Pacific Railway Co.*, 798 F.2d 764, 770 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987) (upholding Federal Rule of Evidence 606(b) against due process challenge; "defendant's right to a fair trial is not absolute; it may be outweighed by other considerations, including the jury's right to privacy and protection from harassment").

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), a father accused of sexual abuse of his minor daughter subpoenaed the records of the state child welfare agency concerning his daughter. The agency refused to comply with the subpoena, claiming the records to be privileged under state law. 480 U.S. at 43. The Supreme Court of Pennsylvania determined that the father, through his attorney, was entitled to review the entire file to search for any useful evidence with " 'the eyes and the perspective of an advocate,' who may see relevance in places that a neutral judge would not." 480 U.S. at 46. On writ of certiorari, this Court reversed, holding such disclosure not required by the due process clause. The Court stated that "[a]lthough the eye of an advocate may be helpful to a defendant in ferreting out information, this Court has never held—even in the absence of a statute restricting disclosure—that a defendant alone may make the determination as to the materiality of the information." 480 U.S. at 59 (citations omitted). The Court held that the father's interest "in ensuring a fair trial can be protected fully by requiring that the [agency's] files be submitted only to the trial court for in camera review." 480 U.S. at 60.

In the instant case, petitioners would have this Court declare a constitutionally protected right of litigants to conduct unbridled post-verdict juror interviews.[17] As in *Ritchie*, petitioners would have jury

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[17] The cases cited by petitioners as purportedly evidencing a conflict among the lower courts as to when post-verdict juror contact is appropriate do not support their argument in favor of constitutional entitlement to interview jurors in any case. *See Haeberle v. Texas International Airlines*, 739 F.2d 1019, 1021-22 (5th Cir. 1984) (appellate court uniformly refuses to overturn

interviews conducted with "the perspective of the advocate" rather than with the protections of judicial oversight. The danger to the jury system inherent in such conduct has been long recognized by this Court. *See Tanner, Stein* and *McDonald, supra.*

The Petition for Writ of Certiorari raises only a challenge to the trial court's authority to condition post-verdict interviews of jurors upon a showing of good cause. To the extent, however, petitioners' argument implies some unarticulated inadequacy in the

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denial of leave to interview jurors for purpose of obtaining evidence of impropriety in deliberations unless specific evidence of misconduct shown; distinguishing first amendment interests in flow of information from jurors to public); *United States v. Narciso*, 446 F.Supp. 252, 324-25 (E.D. Mich. 1977) (American Bar Association's rulings on ethical considerations concerning post-verdict juror contact "somewhat ambiguous"—"the law" not ambiguous as asserted by petitioners; trial court deemed its failure to prohibit post-verdict juror contact "perhaps short sighted" and condemned the conduct of government in conducting post-trial inquiry as "extremely ill-advised" and "imprudent"); *United States v. Sanchez*, 380 F.Supp. 1260, 1265-66 (N.D. Tex. 1973) *aff'd*, 508 F.2d 388 (5th Cir.), *cert. denied*, 423 U.S. 827 (1975) ("disgusting practice of unbridled interrogation of jurors" not permitted; jurors allowed to be interviewed in non-harassing manner "where good cause appears"; no implication that counsel is to determine existence of good cause); *Irving v. Bullock*, 549 P.2d 1184, 1188 n.9 (Alaska 1976), *modified, Elisovsky v. State*, 592 P.2d 1221 (Alaska 1979) (trial court expressly gave attorneys permission to speak with jurors after trial; no implication that permission was based upon constitutional right); *Olberg v. Minneapolis Gas Co.*, 291 Minn. 334, 191 N.W.2d 418, 424-25 (1971) (although trial court should be "liberal" in granting hearing with respect to juror misconduct, attorney should not be allowed to contact jurors in an effort to obtain information upon which to base motion for hearing).

trial court hearing[18] or attempts to challenge the correctness of the trial court's determination that good cause had not been shown in the instant case, such contentions are clearly without foundation. Although a court must satisfactorily probe nonfrivolous charges of jury spoilage (*see Smith v. Phillips*, 455 U.S. 209, 218 (1982); *Remmer v. United States*, 347 U.S. 227, 230 (1954); *Mahoney v. Vondergritt*, 938 F.2d 1490, 1493 (1st Cir. 1991), *cert. denied*, 112 S.Ct. 1195 (1992); *Neron*, 841 F.2d at 1201), the trial court has broad discretion in determining how to investigate an allegation of juror misconduct. *See, e.g., United States v. Cuthel*, 903 F.2d 1381, 1382 (11th Cir. 1990); *United States v. Gravely*, 840 F.2d 1156, 1159 (4th Cir. 1988); *Maldonado*, 798 F.2d at 769; *United States v. Moon*, 718 F.2d 1210, 1235 (2nd Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); *United States v. Yonn*, 702 F.2d 1341, 1344-45 (11th Cir.), *cert. denied*, 464 U.S. 917 (1983). A post-verdict interrogation of the jury requires that the requesting party show "clear, strong, substantial and incontrovertible evidence . . . that a specific, non-speculative impropriety has occurred". *Moon*, 718 F.2d at 1234; *see Cuthel*, 903 F.2d at 1383 (quoting *Moon*); *Ianniello*, 866 F.2d at 543 (quoting *Moon*); *King*, 576 F.2d at 438; *United States v. Abcasis*, 811 F.Supp. 828, 835-36 (E.D.N.Y. 1992) (quoting *Moon*); *cf. Gravely*, 840 F.2d at 1159 (requesting party must make threshold showing of improper outside influence); *Wilkerson*, 703 F.2d at 185 (moving party must show "specific instances of misconduct" before post-verdict jury inquiry will be allowed (quoting *O'Rear*, 554 F.2d at 1309-10); *United States v. Riley*, 544 F.2d

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[18] The adequacy of the trial court hearing has never been properly challenged below.

237, 242 (5th Cir. 1976), *cert. denied*, 430 U.S. 932 (1977) (specific instances of misconduct must be shown).

When in the course of the trial court's investigation it becomes apparent that reasonable grounds to suspect impropriety do not exist, the inquiry should end. *Neron*, 841 F.2d at 1202; *Moon*, 718 F.2d at 1234; *United States v. Parker*, 549 F.2d 998, 1000 (5th Cir. 1977). In *Neron*, the United States Court of Appeals for the Second Circuit commended the trial court for holding a prompt evidentiary hearing "[d]espite the obviously speculative quality of the claim". The trial court, however, was justified in concluding the investigation when that presentation "failed to disclose the slightest bit of meat on the skeleton." The court of appeals stated:

> We have found no case which purports to lay down an ironclad rule necessitating posttrial interrogation upon demand of every juror in every circumstance. The Constitution, as we read it, imposes no such across-the-board requirement. . . . [T]here are situations where the evidence of impropriety may be so slight or conjectural as not to support any reasonable inference of prejudicial bias or misconduct. At this extremity . . . interviewing the juror will not significantly decrease the risk of error. . . . The need for post-verdict interviewing is dubious at best, and ultimately depends on the nature and weight of the independent evidence underbracing the claim and on the trial justice's sound discretion.

841 F.2d at 1202-03. The court held that the requesting party was "obliged to make a more cogent

showing before it became constitutionally imperative to recall [a] juror." The court stated that the "petitioner's asseveration, when unrolled, embodied evidence so sparse, a pyramiding of inferences so fragile, a thesis so speculative, as to envelop the bias/misconduct charge in a miasma of doubt. Asthenic to begin with, petitioner's claim was weakened rather than strengthened by his presentation at the hearing." 841 F.2d at 1203.

Likewise, in the instant case, petitioners have never presented anything but conjecture, speculation and surmise to support their allegation of misconduct. As in *Neron*, their "pyramiding of inferences" is indeed "fragile." Petitioners speculate that the two off-duty nurses, employed by respondent Medical Center, somehow learned of the content of supposed confidential settlement negotiations between petitioners and respondent physicians, and, during the course of the short, casual water fountain conversation in the presence of others, managed to convey the substance of the supposed settlement offer to juror Hankins as the amount of workers' compensation benefits being received. Juror Hankins in turn, petitioners surmise, informed fellow jurors of this compensation prior to his being excused from the jury. At the trial court hearing, the court was apprised that counsel for petitioners had actually tape recorded the telephone conversations on which petitioners' motion to interview jurors was based. Upon hearing juror Stasko dispute petitioners' contentions, the trial court reasonably determined there to be no evidence of extraneous influence so as to justify further post-verdict investigation either by court or by counsel. The trial court afforded petitioners sufficient hearing and did

not abuse its discretion in determining that "just cause" had not been shown.

CONCLUSION

Petitioners would have this Court set counsel loose upon jurors whenever counsel, in his sole discretion, determines "just cause" to be present; "[i]t is not at all clear . . . that the jury system could survive". *Tanner, supra.* The Petition for Writ of Certiorari is without merit, and, even if this Court had jurisdiction to consider the petition, and it is respectfully submitted that the Court does not, the Petition for Writ of Certiorari should be denied.

DATED: June 11, 1993.

Respectfully submitted,

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APPENDIX

APPENDIX A

Supreme Court of Mississippi
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Jackson, Mississippi 39205-0249

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August 1, 1990

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This is to advise you that the Mississippi Supreme Court rendered the following decision on the 1st Day of August, 1990.

Supreme Court Case #89-CA-0590

Trial Court Case #19993

Frances Nichols and David Nichols
vs.
Grayden Tubb, M.D., Tom McDonald, M.D., and North Mississippi Medical Center

Frances and David Nichols' Statement of the Facts Treated as a Petition for Extraordinary Relief Pursuant to Miss. Sup. Ct. Rule 21, and as Such, Denied.

Frances and David Nichols' Motion for an Expedited Appeal and for Advancement of This Cause on the Court's Calendar Denied.

Supreme Court Clerk

lwp

ccs: Cary Egbert Bufkin
Dudley Collier Graham
Robert Kimmons Upchurch
Thomas Wicker
Lucius Featherston (Sandy) Sams J
Fred M. Bush Jr.

APPENDIX B

Supreme Court of Mississippi

No. 07-KA-59378

Supreme Court of Mississippi.

Dec. 12, 1990.

Rehearing Denied Feb. 6, 1991

The Circuit Court, Lee County, Elzy J. Smith, J., found attorney in criminal contempt. Attorney appealed. The Supreme Court, Roy Noble Lee, C.J., held that evidence supported conviction of attorney for violating court order prohibiting postverdict communication with members of the jury.

Affirmed.

Thomas J. Lowe, Jr., Jackson, for appellant.

Mike C. Moore, Atty. Gen., Deirdre McCrory, Sp. Asst. Atty. Gen., Jackson, for appellee.

Before ROY NOBLE LEE, C.J., and ROBERTSON and SULLIVAN, J.

ROY NOBLE LEE, Chief Justice, for the Court:

William Lawson, a Tupelo attorney, was found guilty of constructive criminal contempt by the Lee County Circuit Court, Honorable Elzy J. Smith, presiding, and was sentenced to pay a fine of two hundred and fifty dollars and to serve a term of ten days in the Lee County Jail. The jail sentence was suspended. Lawson appeals from the judgment, contending that the Lee County Circuit Court erred in holding him in criminal contempt and assigns the following issue for this Court to decide:

EVIDENCE OF HIS GUILT WAS NOT SHOWN TO BE BEYOND A REASONABLE DOUBT.

FACTS

Appellant, a licensed attorney at law, tried an important medical malpractice case, styled *Frances and David Nichols v. Tubb et al.*, in the Lee County Circuit Court. The trial began on January 19, 1988, and concluded on February 4, 1988. Apparently, the courtroom atmosphere was charged with emotion, since it was rumored that the defendants had offered on two occasions to settle the suit for in excess of 1.5 million dollars, which was not accepted by the plaintiffs. On February 4, in the absence of the jury but in the presence of Lawson and other attorneys in the case, the trial judge, Honorable Frank Russell, read and entered an order governing the conduct of attorneys, parties and other persons in the courtroom upon, and after, return of the jury's verdict.[1]

---

[1] ORDER REFERENCE CONDUCT IN COURTROOM UPON RETURN OF JURY VERDICT AND QUESTIONING OF JURORS

The jury in this case having indicated to the Court it is prepared to return to the courtroom for the purpose of reporting as to its verdict in this case.

IT IS ORDERED AND ADJUDGED as follows:

1. Upon the return of a verdict by the jury in any civil or criminal action, neither the attorneys in the action, the parties, nor any other person in the courtroom or else where shall express to the members of the jury their pleasure or displeasure with the verdict.

2. After the jury has been discharged, neither the attorneys in the action, the parties, nor any other person shall at any time or in a manner communicate with the jury or any member thereof regarding the verdict.

Provided, however, that if any attorney believes in good faith that the verdict may be subject to legal challenge, such attorney may apply ex parte to the trial judge for permission to interview one or more members of the jury regarding any fact or circumstance claimed to

Subsequent to reading the order, Judge Russell brought the jury into the courtroom and the jury presented its verdict for the defendants. Judge Russell advised the jury that the mentioned order had been entered and that it prohibited the attorneys and parties of the case from initiating any conversation with members of the jury.

On the Saturday immediately following the trial, Dr. Gary, a witness in the trial, who had been discharged prior to the time that the aforementioned order had been read, and who had no knowledge of the same, telephoned Mrs. Denham, an alternate juror in the case. Denham had been a long time friend of Dr. Gary and Gary, concerned with the jury verdict, questioned Denham about such verdict. During their conversation Denham made mention of the fact that she had knowledge that the plaintiff in the trial had been receiving seven thousand dollars a month from workmen's compensation. Gary, concerned that Denham was privy to information which was not properly put into evidence before the jury, called Lawson the next day, Sunday, and advised him of his conversation with Denham.

Lawson initially attempted to call Judge Russell to relate to him the Gary/Denham discussion. Although Lawson made several attempts to contact Judge Russell, he was unable to do so. Lawson then called Denham. Denham refused to give Lawson any information asserting that she would not talk to Lawson without first gaining Judge Russell's permission to do so.

Shortly after Lawson's conversation with Denham, Lawson then called Chester Stasko, a juror in the case. Stasko related to Lawson that he had become aware of the workers compensation payments to the plaintiff the evening after the jury verdict had been given.

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support such legal challenge. If satisfied that good cause exists, such judge may grant permission for the attorney to make the requested communication and shall prescribe the terms and conditions under which the same may be conducted.

The following Monday morning, Lawson went to Judge Russell's office to relate to Russell what had transpired between himself and the jurors. Russell showed Lawson a copy of his order which had prohibited communication with the jurors absent obtaining prior court approval. At this time Lawson immediately informed Judge Russell that he had taped the conversations between himself and the jurors.

Criminal Contempt proceedings were begun against Lawson in the Lee County Circuit Court before Judge Elzy J. Smith sitting specially.[2] Lawson asserted that although he was present at the time Judge Russell's order had been read, that due to a hearing deficiency he was unable to comprehend the same. Judge Smith found Lawson guilty of constructive criminal contempt and fined Lawson two hundred and fifty dollars. In addition to such fine, Judge Smith also sentenced Lawson to serve ten days in the Lee County Jail. Judge Smith suspended the jail sentence due to the many apologies made to the court by Lawson and due to the fact that Lawson provided the court with tapes of the prohibited conversations.[3]

LAW

Criminal contempt is conduct which is directed against the dignity and authority of the court or the judge acting judicially. *Cook v. State,* 483 So.2d 371 (Miss. 1986). "It arises from an act obstructing the administration of justice which tends to bring the court into disrepute or disrespect." *Id.* at 374. In essence the offense occurs when a defendant wilfully, maliciously and contumaciously refuses

---

[2] Judge Smith is a circuit judge for the Eleventh Circuit Court District of Clarksdale Mississippi.

[3] Lawson, unbeknownst to jurors Denham and Stasko, taped all of the conversation he had with Denham and taped most of the conversation he had with Stasko.

to comply with a decree of the court. *Cook v. State, supra; Langford v. Langford,* 253 Miss. 483, 176 So.2d 266 (1965).

In the case at bar, Lawson was convicted of constructive criminal contempt which occurred outside the presence of the court. Constructive contempt is "an act calculated to impede or embarrass, obstruct, defeat, or corrupt administration of courts of justice when the act is done beyond the presence of the court." *Coleman v. State,* 482 So.2d 221, 222 (Miss. 1986) (quoting *Knox v. State,* 160 Miss 494, 497, 135 So. 206, 207 (1931)). This court proceeds *ab initio* in criminal contempt proceedings and it is the Supreme Court's responsibility to determine on the record whether the defendant is guilty of the offense, not whether the lower court judge was manifestly wrong in his finding. *Cook,* 483 So.2d at 374. The burden of proof is on the state and the state must prove each element of criminal contempt beyond a reasonable doubt. Miss. Code Ann. § 11-51-11(4) (Supp. 1990).

Lawson asserts that the state has failed to prove beyond a reasonable doubt that he is guilty of constructive criminal contempt. The substance of Judge Russell's order had been twice read in the presence of Lawson, once prior to the jury being brought in and once in the jury's presence. Lawson does not dispute that the order was read but rather asserts that he did not comprehend the order. Lawson submits that he has a slight hearing disability which makes comprehension of the spoken word difficult. Lawson also suggests that compounding his hearing disability was the fatigue he was experiencing as the result of such a long and hard fought trial. Lawson states that Judge Russell's order was unusual in that it required prior court permission to contact jurors and that Lawson had never heard such an order before.

While Lawson asserts that he did not comprehend Judge Russell's order his actions suggest otherwise. Lawson, upon learning from Dr. Gary that Mrs. Denham may have had

improper information, attempted to contact Judge Russell on several occasions.[4] Sometime on that Sunday afternoon, after some of the unsuccessful calls to Judge Russell were made, Lawson called alternate juror Mrs. Denham.

> Lawson: I Know you are probably tired of looking at me, but we were mighty close together for the last three weeks. Do you remember the judge?
>
> Denham: Yeah.
>
> Lawson: You know, he told me to check with some of the jurors. And there are just one or two questions that I need to ask you.
>
> Denham: Do you mind if I call the judge and ask him?
>
> Lawson: Yeah. I have got his number would you like to?
>
> Denham: Yeah. I would like to call him and ask him if he gave you permission to call and ask me questions.
>
> Lawson: Oh, yes. Do you remember when you were standing there and, you know, he said two things. One he didn't want any demonstrations, you know, any outburst. And second, he said he would allow—I didn't know what counselor he was talking about because we didn't know the verdicts yet, you know. And see, you weren't a juror.
>
> Denham: That's right I wasn't.
>
> Lawson: You were an alternate.
>
> Denham: Uh-huh.

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[4] Lawson attempted to reach Judge Russell at his home at 12:58 p.m.. Lawson learned that the judge was not home and that he may be at his cabin. Lawson then made several other attempts to reach the judge at his cabin and office at 2:59, 3:00, 4:41, 8:42, and 8:55 p.m.

> Lawson: And he, you know, said he would give us permission to either subpoena some witness back into court or find out, you know, if it is agreeable with them, you know, what happened.
>
> Denham: Well, I am going to have to talk to him first.

Although Lawson asserts he was unaware of the substance of Judge Russell's order prohibiting communications with jurors, Lawson stated to Denham "You know, he told me to check with some of the jurors" even though Judge Russell never told Lawson anything of the kind. When Denham refused to talk with Lawson, since she was of the opinion that she needed Judge Russell's permission as a prerequisite, Lawson attempted to get Denham to talk with him by reminding her that she was not a juror but rather she was an alternate juror. When Denham asked Lawson for Judge Russell's phone number Lawson attempted to change the subject of the conversation, even though Lawson must have had Judge Russell's phone number handy since Lawson had been trying to call Judge Russell all day. Instead of conveying Judge Russell's phone number to Denham, as she requested, Lawson told her that he would put her in touch with the judge.

When Denham refused to talk to Lawson, he then called Stasko, another juror. Although Lawson asserts that he did not comprehend Russell's order he stated to Stasko:

> Lawson: And listen, you know what the judge said there at the end when the verdicts were read?
>
> Stasko: Uh-huh.
>
> Lawson: He said that counsel would be permitted to call, you know,. And now you don't have to say one thing to me if you don't want to.

We are of the opinion that the state has proved beyond a reasonable doubt that Lawson willfully, and contuma-

ciously violated Judge Russell's order and committed constructive criminal contempt. Judge Russell testified that the order he read was one he used frequently and that he has heard orders similar in content read on several occasions. Lawson admits to being present in the court room where Judge Russell read the order once with the jury out and then subsequently conveyed the relevant parts to the jury, with counsel present, when the jury was in. Notwithstanding the order, when unable to contact Judge Russell, Lawson contacted two jurors and attempted to have them discuss items relevant to the case with him, by pretending to have authority to contact such jurors from Judge Russell.

The judgment of the lower court is affirmed.

SENTENCE OF CONTEMPT OF COURT AND PAY A FINE OF $250.00 AND SERVE TEN DAYS IN THE LEE COUNTY JAIL, TEN DAYS SUSPENDED UPON PAYMENT OF FINE AND COURT COSTS AFFIRMED.

HAWKINS, P.J., DAN M. LEE, P.J., and PRATHER, ROBERTSON, SULLIVAN, PITTMAN and BLASS, JJ., concur.

ANDERSON, J., not participating.